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FILED
MAR 2 1995
OFFICE OF THE CLERK

No. 94-1127

In the Supreme Court of the United States

OCTOBER TERM, 1994

VICTORIA M. VOGE, *Petitioner*,

v.

JOHN H. DALTON, SECRETARY OF THE NAVY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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MARCH 1995

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1. By scrambling the sequence of events, the Secretary conveys a distorted picture of the facts. Specifically, he contends (2) that petitioner lost her clinical privileges "after doubts arose concerning her medical competence in the areas of clinical judgment and patient care," and only later (3) mentions that Dr. Voge was referred for a psychiatric examination which resulted in her being provisionally diagnosed as paranoid. The circumstances were actually quite different. Dr. Voge's commander on Guam caused her to be psychiatrically evaluated *before* steps were taken to revoke her privileges. The decredentialing proceeding, which violated the Navy's *Fair Hearing Plan*, was only commenced after Dr. Voge, having been "medevaced" to a Naval Hospital in California on the basis of the provisional diagnosis of paranoia, was found fit for full duty. This frustrated the command's attempt to get rid of her on

psychiatric grounds. The sequence of events—first, an unsuccessful effort to obtain a psychiatric diagnosis, and only then, pursuit of an illegal decredentialing—is key.

2. The petition noted (10) that the Secretary's brief to the Court of Appeals took the position that the *Fair Hearing Plan* issue was not properly before it. The Secretary claims (8), however, that the Court of Appeals "appears to have considered" that issue because it was presented in Dr. Voge's briefs and oral argument below. He also points (9) to a sentence from the Fourth Circuit oral argument transcript and another from the Court of Appeals decision. These bits and pieces do not furnish the assurance to which Dr. Voge and this Court are entitled that her due process issue was in fact considered.

a. As appellee below, the Secretary filed a single brief. That brief incorrectly argued that the Court of Appeals was at liberty to ignore the *Fair Hearing Plan* issue because Judge Bryan did not address it in his 1993 ruling, as it had not been included in his 1990 remand order. At no time did the Secretary confess error or seek to correct, withdraw or disavow this or any other part of his brief, although the language he reproduces from the oral argument transcript is inconsistent with it. Perhaps the Secretary has come to realize the error in his brief, and perhaps he would agree that if the Court of Appeals did act in accordance with the approach suggested in that brief, the first Question Presented is raised. The problem for both parties is that it is not possible to determine from the Fourth Circuit's decision whether that court treated agency counsel's oral argument as having abandoned the position taken in the Secretary's brief.

b. This in turn raises a further ambiguity, for the decision below fails to disclose the Fourth Circuit's position on whether, as a threshold matter, the *Fair Hearing Plan* issue was properly before it, and further, if it was, whether the *Plan* had been violated. Given the complete silence of

the decision on either issue, one can only speculate as to the logical path the Court of Appeals took. Certainly, the absence of any reference to *Service v. Dulles*, 354 U.S. 363 (1957), strongly suggests that it felt itself under no duty to determine—and did not decide—whether the Navy impermissibly violated its own regulation. The opinion below is completely consistent with the position the Secretary took in his brief and leaves no basis for concluding that the Court of Appeals disagreed with that position or adopted the position agency counsel ultimately took at oral argument with regard to the merits of the *Fair Hearing Plan* issue. 4th Cir. Tr. 27-31.

c. In an effort to circumvent the problem created by the Court of Appeals' silence, the Secretary claims (9) that one particular sentence in the opinion "affirmatively indicates that the court did not confine its review to the command influence issue" which Judge Bryan had remanded. The point is without merit because, as the Secretary's counsel advised the Court of Appeals, there were *five* issues in the case on appeal. 4th Cir. Tr. 19. Hence, to say, based on the emphasis-added "*and*" that the part of the sentence in question that refers to matters other than the 1990 remand must have been intended to refer to the *Fair Hearing Plan* is fallacious.

d. Finally, the Secretary ignores the fact that Dr. Voge's petition for rehearing and suggestion for rehearing *en banc* specifically drew the Court of Appeals' attention to its failure to address the *Fair Hearing Plan* issue. If the Court of Appeals had in fact addressed it, the panel could easily have said so in its order denying rehearing. Instead, rehearing was denied without explanation. App. 6. This sequence of events and unexplained judicial action in a court whose appellate jurisdiction is mandatory rather than discretionary provides no assurance that this important issue has been addressed. Such a matter should not be left to speculation.

e. Whether Dr. Voge's right to appellate review was improperly truncated should not be left to speculation. The Court of Appeals had the last clear chance to explain why it ruled as it did, but failed to take it. This Court should dispense with full briefing and argument and direct the Court of Appeals either to address Dr. Voge's *Service v. Dulles* issue or explain why that issue need not be addressed.

3. A similar obscurity pervades the Court of Appeals' treatment of Dr. Voge's *Universal Camera* issue. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The Secretary argues (10) that, by claiming that it had considered all of the materials that Dr. Voge submitted in support of her application, the Board for Correction of Naval Records satisfied the APA's requirement to consider the whole record. This claim is an "appeal to unreality," *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1940) (Frankfurter, J., dissenting), and cannot be taken seriously. The BCNR refused to correct Dr. Voge's medical records substantially for the reasons stated by its consultant, Captain Mateczun. App. 57. But the BCNR never furnished him the powerful independent psychiatric evaluations which she had filed. App. 70-93, 94-105.* It has obviously *never* taken those evaluations into account.

It was not for the Court of Appeals to do the BCNR's work, and even if it were, the decision below, by ignoring the evidence of which the BCNR kept Captain Mateczun in ignorance, fails to render a rational account of the agency record. The Fourth Circuit had a duty to

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* The BCNR also referred to an advisory opinion from an office in the Bureau of Naval Personnel. App. 57. That office was concerned only with Dr. Voge's fitness reports. Like Captain Mateczun, it was not furnished with and did not address the independent psychiatric evaluations she submitted.

remand with instructions to the BCNR to consider the independent psychiatric evaluations and, if relief was to be denied, explain why they did not dictate changes in Dr. Voge's record. It failed to do so.

Conclusion

For the foregoing reasons and those previously stated, certiorari should be granted. The Court may wish to grant, vacate and remand to afford the Court of Appeals an opportunity to clarify its action in this case.

Respectfully submitted.

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